

## ADMINISTRATIVE APPEAL DECISION

MINIDOKA COUNTY, IDAHO, FILE NO. 012200500

WALLA WALLA DISTRICT

DATE: November 21, 2003

**Review Officer:** Mores Bergman, U.S. Army Corps of Engineers (Corps), Northwestern Division.

**Appellant:** Minidoka County, Idaho

**Appellant's Representative:** Rick Bollar, Prosecuting Attorney for Minidoka County

**Receipt of Request For Appeal:** July 7, 2003

**Action Appealed:** Approved Jurisdictional Determination

**Appeal Site Visit Date:** August 20, 2003

**Background Information:** On July 3, 2002, Mr. Gale Roberts of Resource Solutions submitted a wetland delineation report to the Corps Walla Walla District (District), on behalf of Minidoka County, Idaho, in connection with the proposed development of property owned by the County. The property is located at the intersection of Interstate Highway I-84 and State Highway 24, in Minidoka County, Idaho. On the property is a small waterbody, known as Pond 208, and wetlands that are located adjacent to the pond. On July 11, 2002, the District provided an approved jurisdictional determination (JD) to Minidoka County for Pond 208 and the wetlands. The District's approved JD provided concurrence with the delineation map submitted by Mr. Roberts and determined that the pond and its adjacent wetlands are waters of the United States subject to Corps jurisdiction under Section 404 of the Clean Water Act. 33 U.S.C. § 1344.

On March 26, 2003, Mr. Rick Bollar, Minidoka County Prosecuting Attorney, sent a letter to the District requesting a reconsideration of the District determination of jurisdiction over Pond 208 and the wetlands in light of the 2001 Supreme Court decision regarding isolated waters in Solid Waste Agency of Cook County (SWANCC) v. Corps of Engineers, 531 U.S. 159 (2001). As a result of the inquiry, the District reevaluated their jurisdictional determination, and on April 16, 2003 verified that the Corps has jurisdiction over Pond 208 and the adjacent wetlands. The District sent a revised "approved JD" for the site to Mr. Bollar. The revised JD states that Pond 208 is used, or may be susceptible for use, in interstate commerce. Specifically, the pond is currently being used by interstate travelers for boating, fishing, and other recreational purposes. The revised approved JD also states that the wetlands on the site are adjacent to Pond 208, and as such, are also jurisdictional.



On May 23, 2003, Mr. Bollar sent a Request for Appeal to the Corps Northwestern Division (NWD), stating that the County disputes the JD prepared by the District. Upon initial review, the Review Officer determined that the request contained insufficient information regarding the reasons for appeal. The Review Officer requested additional information from Mr. Bollar, which was provided in a letter, dated June 30, 2003. The reasons for appeal are listed below. On August 20, 2003, the Review Officer conducted a site inspection of Pond 208 and its adjacent wetlands. Representatives of Minidoka County and the Walla Walla District participated in the site inspection.

**Reasons For Appeal Submitted by Appellant:** Following is a summary of the reasons for appeal as presented by the appellant.

**Reasons 1:** The County does not believe that the fortuitous event of a non-resident angler in a non-destination fishing area would constitute the interstate impact adequate to assert jurisdiction.

**Reason 2:** The pond is isolated as to water source and is not in the flow of the Snake River, a tributary of that waterway, or of any other waterway. It is fed by a perched water table as an artificial area of retainage and not in the stream of commerce or within the jurisdiction of the Army Corps of Engineers.

**Information Received During the Appeal Review and Its Disposition:**

The District provided the Review Officer and the appellant with a copy of the administrative record for the jurisdictional determination, which included the basis for JD, maps and aerial photographs of the area in question. This information was considered in the appeal review.

Information obtained during the August 20, 2003 site visit was considered in the appeal review to the extent that it clarified the information contained in the administrative record.

**Summary of Decision:** The appellant's appeal does not have merit. It is determined that the District has provided sufficient evidence in the administrative record to support their determination that Pond 208 and the wetlands adjacent to Pond 208 are waters of the United States and are subject to Corps jurisdiction.

**Appeal Decision Findings and Instructions for District Action (if required):**

**Appellant's Reason 1:** The appellant does not believe that the fortuitous event of a non-resident angler in a non-destination fishing area would constitute the interstate impact adequate to assert jurisdiction.

**Findings:** The appellant's Appeal Reason 1 does not have merit for the reasons contained in the "Discussion" section below.



**Action:** No action required by the District.

**Discussion:** In Mr. Rick Bollar's June 30, 2003 letter, providing additional information on the appeal, he contends that the District's sole basis for determining jurisdiction over Pond 208 is predicated on a determination by the Idaho Department of Fish and Game (IDFG) that out of state anglers had fished in Pond 208. As stated in the appeal reason above, Minidoka County does not believe that the by-chance fishing at Pond 208, by a non-resident angler is adequate reason to support the assertion of jurisdiction by the Corps. Mr. Bollar had also indicated in his letter to the District, dated March 26, 2003, that Minidoka County questioned jurisdiction over the isolated pond and wetlands on the site in light of the Supreme Court's decision in SWANCC.

In the District's JD document dated April 7, 2003, which was attached to their approved JD letter of April 16, 2003, the District stated that the IDFG has documented fishing by out-of-state residents at Pond 208, and that fishermen have used float tubes on the pond. The District also indicated in their JD that IDFG has also used boats on Pond 208, which further demonstrates that the pond is navigable by small craft. The District also stated in their JD that the IDFG holds an easement on the property, which allows use by the general public for recreational purposes, including the construction of recreational improvements such as handicapped fishing dock, sanitary facilities and parking for overnight camping. The District further noted in the JD that the IDFG stocks the pond with trout for public fishing. A copy of the IDFG easement and other evidence supporting the District's JD statements are contained in the District's administrative record for this case.

As part of the appeal review, the Review Officer evaluated whether the District's JD was prepared in compliance with relevant laws, regulations, and agency policy guidance. On the JD document, dated April 7, 2003, the District indicated that Pond 208 meets the definition of "waters of the United States" as contained in the Corps Permit Program Regulation 33 C.F.R. § 328.3 (a)(1) and (a)(3)(i). Section 328.3(a)(1) states: "All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." Section 328.3(a)(3)(i) states: "All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) which are or could be used by interstate or foreign travelers for recreational or other purposes."

As mentioned above, the District has provided sufficient evidence in their administrative record that supports their determination that interstate commerce at Pond 208 has occurred in the past, is currently occurring, and is susceptible for such use in the future in the form of fishing, boating, and other recreational activities by interstate travelers.

The District also determined in their JD that the wetlands surrounding Pond 208 are jurisdictional "waters of the United States" because they are contiguous to Pond 208. Regulation 33 C.F.R. § 328.3(a)(7) states that wetlands that are adjacent to other waters



(other than those adjacent to other wetlands) identified in sections 328.3 (a)(1)-(6) are also waters of the United States. The regulation, at 33 CFR 328.3(c), defines adjacent as "bordering, contiguous, or neighboring." During the appeal review site visit on August 20, 2003, it was confirmed that the wetlands on the site are adjacent to Pond 208.

On January 15, 2003, the Department of the Army (DA) and the Environmental Protection Agency (EPA) published guidance, in the Federal Register (Vol 68, No. 10), regarding Clean Water Act jurisdiction as a result of SWANCC. That guidance states (on page 1996) that isolated intrastate waters that are capable of supporting navigation by watercraft remain subject to jurisdiction after SWANCC if they are traditional navigable waters. 68 Fed. Reg. 1996. The guidance further states (at fn 2) that traditional navigable waters are not limited to those waters under Section 10 of the River and Harbor Act, and that traditional navigable waters include waters that are used, susceptible for use, or were historically used to transport goods or people in commerce, even though they do not form part of a continuous waterborne highway. 33 U.S.C. § 403. In other words, isolated waters can be "waters of the United States" if navigation occurred or is susceptible in those waters by interstate or foreign travelers.

I find that the District complied with applicable laws, regulations, and agency policy, including the SWANCC guidance, in preparing their JD, and that the District's JD is supported by sufficient evidence in the administrative record. I, therefore, conclude that Appeal Reason 1 does not have merit.

**Appellant's Reason 2:** The pond is isolated as to water source and is not in the flow of the Snake River, a tributary of that waterway, or of any other waterway. It is fed by a perched water table as an artificial area of retainage and not in the stream of commerce or within the jurisdiction of the Army Corps of Engineers.

**Findings:** The appellant's Appeal Reason 2 does not have merit for the reasons contained in the "Discussion" section below.


**Action:** No action required by the District.

**Discussion:** Although it is correct that the pond as it currently exists is isolated and not a tributary to the Snake River or other waterway, the District has presented adequate evidence, as discussed under Reason 1 above, to support their determination that interstate commerce, in the form of boating, fishing and other recreational use by interstate travelers, has occurred in the past and is susceptible for use in the future at Pond 208. The District therefore determined that the pond is a water of the United States within the Corps jurisdiction. Also as discussed under Reason 1 above, the District has shown that the wetlands on the site are adjacent to Pond 208 and, as a result, are also considered waters of the United States. I, therefore, find that Appeal Reason 2 does not have merit.



**Overall Conclusion:**

After reviewing the information contained in the Walla Walla District's administrative record, information presented by the appellant, and observations made during the site visit, I conclude that this Request For Appeal does not have merit for the reasons provided in the discussions above.



Peter C. Gibson  
Chief, Operations Division